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ABD RAHIM ABD RAHMAN & ORS

v.

DMD INDUSTRIES SDN BHD & ORS; KAMARIAH HAMDAN & ORS (THIRD PARTIES)

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HIGH COURT MALAYA, MUAR
AHMADI ASNAWI J
[CIVIL SUIT NO: 22-29-2000]
30 JULY 2010

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AGENCY: *Authority of agent - Power of attorney (PA) - Land owners entered into joint-venture agreement (JVA) and granted PA to company to develop land into housing estate - Company charged lands to bank for purposes unconnected to JVA - Whether charges executed without land owners' authority - Whether invalid - Bank accepted charge without perusing PA or JVA or land titles - No*

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enquiry to ascertain company's authority to charge - Whether bank breached duty of care to land owners - National Land Code, s. 340(2)(b) & (3)

The plaintiffs were registered owners of separate pieces of land (collectively called 'the lands'). They entered into a joint-venture

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agreement (JVA) with the first defendant ('DMD') to develop the lands into a housing estate. For that purpose, the plaintiffs handed over vacant possession of the lands to DMD and executed in its favour an irrevocable Power of Attorney (PA). The PA was to allow DMD to do all things necessary to develop the lands into a housing estate including

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obtaining loans or bridging finance for that purpose. Unknown to the plaintiffs, and without their consent, DMD charged the lands to the second defendant ('the bank') as security to obtain three facilities for DMD's own benefit unconnected to the JVA. These were a property loan of RM4.4m to finance the purchase of an industrial lot with a factory and office building, RM3m for multi-trade facilities and RM1m

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for foreign exchange contracts. The plaintiffs, who did not in any way benefit from the grant of these facilities, claimed they only knew about the existence of the charges when they received notices of default under the National Land Code (NLC). The plaintiffs sued and obtained judgment in default against all the defendants, except against the bank.

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The bank's proceedings against the third parties in the suit were stayed by consent pending the disposal of the plaintiff's case against the bank. The plaintiffs claimed, *inter alia*, for declarations that the charges over the lands were invalid, that they be set aside and that the bank be restrained from auctioning the lands.

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Held (allowing the plaintiffs' claim with costs):

(1) The purpose and intention of granting the PA was only for the development of the lands into a housing estate. The first defendant had no authority to charge the lands for the purposes indicated in the credit facilities granted to it by the bank. The charges were therefore invalid and unenforceable. (paras 14 & 22)

(2) As the first defendant acted in excess of the authority granted to it under the PA in charging the lands for purposes unconnected with the JVA, it simply meant the charges were effected by means of an insufficient instrument within the ambit of s. 340(2)(b) of the NLC. The charges were null and void and could be set aside. (para 23)

(3) The bank was not a subsequent purchaser but an immediate purchaser. Hence s. 340(3) of the NLC could not assist the bank as the exception to the proviso only applied to subsequent *bona fide* purchasers for valuable consideration. (para 24)

(4) The bank clearly breached its duty of care to the plaintiffs in failing to enquire as to the extent of the first defendant's actual authority as attorney for the plaintiffs. It must, or ought to, have known that the first defendant did not have the authority under the PA and JVA to charge the lands for its own benefit. Both the bank and the first defendant stood to profit from this transaction at the plaintiffs' expense. (para 28)

Case(s) referred to:

Bryant, Powis and Bryant v. La Banque du Peuple [1893] 1 AC 170 ***(refd)***
Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA ***(refd)***
Jerneh Insurance Corporation Sdn Bhd v. Hai Heng Enterprise Sdn Bhd [2002] 4 MLJ 332 ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***
Magnum Finance Bhd v. Ling Sing Ping [1988] 1 LNS 34 HC ***(refd)***
Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***
Perwira Habib Bank Malaysia Berhad v. Viswanathan Ramakrishnan [1996] 2 CLJ 505 HC ***(refd)***
Subramania Pillay v. Sundarammal [1968] 1 LNS 148 FC ***(refd)***
Young Kee Chan & Ors v. Phileo Allied Finance (M) Bhd [2000] 4 CLJ 603 HC ***(refd)***

Legislation referred to:

National Land Code, s. 340(2)(b), (3)

For the plaintiff - Mah Weng Kwai; M/s Mah Weng Kwai Seow & Megat
For the defendant - Maziah Md Yamin; M/s Chee Siah Le Kee & Partners

Reported by Ashok Kumar

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JUDGMENT

Ahmadi Asnawi J:

[1] The plaintiffs have obtained judgment in default against the first, third, fourth and fifth defendants. Half way through the trial of this suit, the proceedings by the second defendant against the third parties were stayed by consent until the disposal of the plaintiffs' case against the second defendant. Hence the trial of this suit is now confined to the matters between the plaintiffs and the second defendant only.

Facts Of The Case In Brief

[2] The first plaintiff is the registered owner of land held under EMR 325, Lot 713, Mukim Bakri, Daerah Muar. The second plaintiff is the registered owner of land held under EMR 194 Lot 672, also in Mukim Bakri. The third plaintiff is the registered owner of land held under EMR 1692 Lot 678, also in Mukim Bakri. (Hereinafter referred collectively as "the said lands")

[3] On 13 January 1994, the plaintiffs entered into a joint venture agreement (JVA) with the first defendant whereby the plaintiffs have agreed and given permission to the first defendant to develop the said land into a housing estate. This intention is indicated in preamble (a)(iv) and cl. 1 of the JVA. The JVA is marked exh. P4 and appearing at pp 100 to 122 of lampiran 234, the parties Ikatan Dokumen Bersama.

[4] In furtherance of their common intention, all the three plaintiffs each executed an irrevocable power of attorney (PA) in favour of the first defendant. This is in pursuant to cl. 24(a) and (b) of the JVA. The PAs are marked exh. P5, appearing at pp. 123 to 151 of lampiran 234. The purpose of the PAs was to allow the first defendant to do all things necessary to obtain the necessary approvals and generally for the development of the said lands into a housing estate. The PAs also allowed the first defendant to obtain loans or bridging finance but was expressly limited for the purpose of developing the said lands into a housing estate - see preamble (2), (4), and cls. (1), (13) and (15) of the PAs.

[5] The plaintiffs delivered vacant possession of the said lands to the first defendant and deposited the relevant land tittles with their solicitors, Messrs Khairin Nisa' & Co. PW2 from the said firm later testified that she handed the said titles to the first defendant through its officer, one Ismail bin Salleh.

[6] The first defendant thereafter cleared the said lands and commenced some earth works. Beyond that nothing was done. A

[7] Unknown to the plaintiffs, the first defendant entered into and executed a facilities agreement with the second defendant on 9 January 1997. The said agreement is exh. P6, at pp. 15 to 77 of lampiran 234. As security for the said facilities, the first defendant, *inter alia*, charged the said lands to the second defendant, again without the knowledge or authorization of the plaintiffs. The said charges are exh. P7, at pp. 78 to 89 of lampiran 234. B

[8] Under the said facilities the first defendant obtained RM4,400,000 to finance the purchase of an industrial lot with a single-storey factory cum an annexed two-storey office building, RM3,000,000 for multitrade facilities and RM1,000,000 for foreign exchange contract. C

[9] The plaintiffs claimed never to have authorized the granting of the said facilities upon such terms and conditions and have not benefited in any manner whatsoever from the said facilities. Additionally they claimed to have known of the charges only upon being served with a notification in form 16D - "Notis Kemungkiran Mengenai Satu Gadaian" - dated 6 April 1998 by the second defendant. The said notice is exh. P8 appearing at pp. 90 to 98 of lampiran 234. D E

The Plaintiffs' Claim Against The Second Defendant

[10] Thus in this suit the plaintiffs claimed against the second defendant for, *inter alia*, declarations that the second defendant's charges over the said lands are invalid and of no effect, that the said charges are cancelled and that the second defendant be restrained from auctioning the said lands. F

[11] There are four issues to be tried, agreed by the parties as evinced in lampiran 232. In my view the issues enumerated in the said lampiran must necessarily be connected with the following: G

Whether The First Defendant Had Actual Authority To Charge The Said Lands In His Capacity As Attorney For The Plaintiffs Pursuant To The PA's Upon Such Terms And Conditions Granted Under The Said Credit Facilities H

[12] The law is trite that a power of attorney must be strictly construed. It only conferred such authority as they are conferred expressly or by necessary implication. See *Bryant, Powis and Bryant v. La Banque du Peuple* [1893] 1 AC 170 at p. 177, *Subramania Pillay v. Sundarammal* [1968] 1 LNS 148; [1968] 2 MLJ 115 at 116, *Magnum* I

A *Finance Bhd v. Ling Sing Ping* [1988] 1 LNS 34; [1986] 2 MLJ 403 at p. 404 and *Perwira Habib Bank Malaysia Berhad v. Viswanathan Ramakrishnan* [1996] 2 CLJ 505.

[13] In this case before me, PW1 said that the said PAs were given exclusively to the first defendant to enable the first defendant to develop the said lands into a housing estate pursuant to the JVA. The plaintiffs' then solicitor (PW2) confirmed that it is so. Paragraphs 2 and 4 of the preamble and cls. 1, 13 and 15 of the PAs also adverted that the purpose of granting the said PAs is solely for the development of the said lands into a lawfully and legally required housing estate.

[14] In the light of the evidence enumerated above, it is my findings that the purpose and intention of the granting of the PAs were only for the development of the said lands into a housing estate. Thus the first defendant's authority to charge the said lands is also limited to the development of the said lands into a housing estate and the carrying out of the JVA. Clearly it has nothing to do with the purchase of a factory or for other purposes as indicated in the credit facilities granted by the second defendant to the first defendant. Accordingly it is my view that the first defendant had no authority to charge the said lands for the purposes indicated in the credit facilities granted by the second defendant.

PAs To Be Read Together With Other Documents Executed Contemporaneously

[15] It is trite law that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one - see *Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413 at 423.

[16] In this case before me the JVA provides that each of the plaintiffs are to execute a PA in favour of the first defendant for the purpose of giving effect to the provisions of the JVA - see cls. 24 (a) and (b) of the JVA. PW1 also states so. PW2 also confirmed the same and the said requirement of the JVA in particular cl. 24(c) and (b) of the same. Conversely cl. (1) of the PAs and preamble (2) and 4 (iv) also makes a reciprocal and express reference to the JVA. The PAs' granted in favour of the first defendant were executed on 12 January 1994 and the JVA was executed on 13 January 1994. The express purpose of the JVA is consistent with the intention and purpose of the granting of the PAs.

[17] Equally by cl. 37 of the JVA, the first defendant's options to raise loans or finance was also expressly limited for the sole purpose of developing the said lands into a housing estate. PW1 also confirmed the same. PW2, the solicitor who prepared the PAs and JVA also confirmed the purport and limits of cl. 37 of the JVA. The testimonies of these two witnesses for the plaintiffs were not challenged either.

[18] In such event both the PAs and JVA must be construed together to ascertain the true intention of the parties when they entered into the JVA and the proper construction of the PAs and the limitation imposed upon the first defendant's authority to deal with the said lands upon execution of the JVA and the PAs. Again upon the true construction of the JVA and the PAs, in my view, the first defendant's actual authority to deal with the said lands is expressly limited for the purpose of developing the said lands into a housing estate. Thus it follows through that the first defendant's authority to charge the said lands to obtain / raise loans or funds or bridging finance is expressly limited to charges for the purpose of developing the said lands into a housing estate pursuant to the JVA and nothing else. The construction of the two documents that were executed contemporaneously could not be construed nor interpreted otherwise.

Purport And Validity Of The Charges

[19] It is an accepted fact that the first defendant used the said PAs to charge the said lands to the second defendant pursuant to the facilities agreement on 16 January 1997.

[20] Section 1.02 of the annexures to form 16 A appearing at pp. 69, 93 and 117 of lampiran 224 showed that the second defendant has agreed to grant to the first defendant banking facilities in the maximum principal aggregate amount of RM8,500,000. Section 5.01 and the 2nd schedule of the facilities agreement at pp. 16, 25, and 57 of lampiran 234 indicated the types and purposes of the said facilities, that could be summarized under three headings ie, - (i) property loan to part finance the first defendant's purchase of a factory with aggregate limit of RM4,400,000; (ii) overdraft facilities to supplement the first defendant's working capital requirement with an aggregate limit of RM1,000,000; and (iii) foreign exchange contract credit for purpose of foreign exchange forward contracts up to RM1,000,00 to hedge against foreign exchange fluctuations with an aggregate limit at RM1,000,000.

[21] It is obvious that the purport of the said credit facilities and purpose of creating the said charges over the said lands has got nothing to do with the development of the said lands into a housing estate pursuant to the JVA and the PAs. Equally it offered no benefit whatsoever to the plaintiffs or the joint venture.

[22] In this connection I am wholly with learned counsel for the plaintiffs' submissions that the act of charging the said lands for the purposes enumerated above was an act in excess of and without the plaintiff's authority. It is trite that in such event the said charges are invalid and unenforceable because they were executed by the first

A defendant without the plaintiffs' authority - see *Perwira Habib Bank (supra)* at pp. 513 and 514; *Glamour Green (supra)* at p. 438. Hence it is my findings that the said charges are invalid and unenforceable.

Indefeasibility At The Said Charges

B **[23]** In my view the said charges are not indefeasible by virtue of s. 340(2)(b) of the National Land Code which provides that the title or interest of any such person or body shall not be indefeasible where registration was obtained by forgery or by means of an insufficient or void instrument. In this case before me it is clear that, as found above, C the first defendant had acted in excess of the authority granted to him under the PAs in charging the said lands for purposes not connected with the JVA. It simply means that the charges were effected by means of an insufficient instrument, within the ambit of the said s. 340(2)(b) of the NLC. Therefore the charges are null and void and can be set D aside at the instance of the court - see *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14 at p. 23; *Young Kee Chan & Ors v. Phileo Allied Finance (M) Bhd* [2000] 4 CLJ 603 at p. 616; and *Perwira Habib Bank (supra)* at p. 515.

[24] Additionally, the second defendant was not a subsequent purchaser E but an immediate purchaser. Hence s. 340(3) could not render any assistance to the second defendant for the exception to the proviso is only applicable to subsequent *bona fide* purchaser for valuable consideration.

F *The Second Defendant's Duty Of Care To The Plaintiffs*

[25] It is not an issue that the second defendant knew that the charges created were third party charges and that the first defendant executed the charges purportedly as attorney for the plaintiffs. In this connection in *Magnum Finance Bhd v. Ling Sing Ping* [1988] 1 LNS 34, Siti G Normah Yaakob J (as she then was) stated:

> As the charge created is a third party charge, the plaintiff owes a duty to at least inquire into the circumstances surrounding the execution of the power of attorney, the purpose of its execution and the limitations imposed on it.

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It is apparent that the law imposed a certain duty of care on the part of the second defendant in such a situation.

[26] Now DW1 was the second defendant's officer who processed the I loan submitted by the first defendant. He stated that he was not informed of the JVA or PAs at the time the application was made. He had not and had never seen the JVA, the PAs or the original land titles at the time of processing the loan application or thereafter. These

documents were also not submitted to him with the application form for the loan. He also said that at the time he processed the loan application, no valuation was done on the said lands; not aware if land search was done on the said lands; did not know who the registered owners of the said lands were; and did not know that there was no company resolution from the first defendant giving authority to Ismail Salleh to apply for the said loan. DW1 also admitted that though he knew that the first defendant was acting as attorney for the plaintiffs, he did not verify whether the first defendant as attorney, was acting within the authority and scope of the PAs. He accepted whatever Ismail Salleh said.

[27] DW2, the head of the second defendant's legal department fared no better. She admitted that she did not see the JVA or the PAs before the execution of the facilities agreement on 9 January 1997. Equally she admitted that she did not ask to see the PAs or the title deeds to the said lands despite knowing that the application was for third party charges.

[28] It is apparent that the second defendant's conduct was most irresponsible and negligent. Such conduct and indolence deserves no protection or sympathy from the courts. The second defendant displayed a total disregard of the duty of care imposed upon them by law to the plaintiffs. The extent of the first defendant's actual authority as the plaintiffs' attorney to charge the said lands for the aforesaid purposes was furthest from their minds. The second defendant was clearly in breach of this duty to enquire the extent of the first defendant's actual authority as attorney for the plaintiffs. As was said by her Ladyship in *Magnum Finance Bhd v. Ling Sing Ping (supra)*:

> I can only conclude that when approving the loan to the developer and accepting the charged documents executed by Ban (the attorney) the plaintiff (chargee) did not bother to look at the agreement and neither was it concerned with the legal construction of the power of attorney and it cannot therefore now disclaim knowledge of the agreement nor the legal construction of the power of attorney.

The second defendant's conduct were on all fours with the conclusion made by the learned judge in the case above. I have no cause to disagree with her. If not for the second defendant's negligence and indolence, the second defendant must have known or ought to have known that the first defendant did not have the authority under the PAs and JVA to charge the said lands for its own benefit. At the end of the day both the first and second defendant stood to profit from this transaction at the expense of the plaintiff. In such event no law would assist the second defendant to protect its interest. On the facts and evidence, the second defendant's act of creating the said charges over the said lands upon the said terms and conditions is plainly indefensible.

A *The Judgment In Default Entered Against The First, Third, Fourth And Fifth Defendants On 9 June 2005*

[29] It is the submission of learned counsel for the second defendant that the plaintiffs, having entered judgment in default for the alternative claim against the defendants above is now barred from proceeding with the claim against the second defendant. Furthermore the claim against the first, third, fourth and fifth defendant is inconsistent with the claim against the second defendant. Hence the plaintiffs cannot obtain judgment for both claims. It is either one or the other.

[30] However this issue was neither pleaded in the second defendant's statement of defence nor in their statement of agreed issues to be tried. It cropped for the first time only in learned counsel for the second defendant's submissions.

[31] Learned counsel for the plaintiffs submitted that this is tantamount to springing a surprise on the plaintiffs. The second defendant ought to be estopped from raising this new issue because the plaintiffs have relied on the statement of issues to be tried and did not lead any evidence to show that the judgment in default against the above defendants have not been satisfied. Equally the second defendant has deprived the plaintiffs of the opportunity of amending their statement of claim, if necessary, prior to the commencement of the trial. He relied on *Jerneh Insurance Corporation Sdn Bhd v. Hai Heng Enterprise Sdn Bhd* [2002] 4 MLJ 332 and *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787 to fortify his arguments.

[32] In this regard I am wholly with the submissions of learned counsel for the plaintiffs and the authorities relied by him. It is now too late for the second defendant to raise the said issues which were not part of the agreed issues and which was neither pleaded in their defence. Additionally it is very apparent that the cause of action taken against the second defendant and prayers sought for are distinct from the causes of action and prayers asked for from the other defendants.

[33] For all the reasons given I allowed the plaintiffs claim in terms of para. 19(i), (ii), (iii), (iv), (v) and costs of proceedings under para. 19(vii) of the plaintiffs statement of claim.